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No. 09-945

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF RESPONDING TO THE UNITED STATES AS *AMICUS CURIAE* 1

I. This Case Provides An Excellent Vehicle For Resolving The Circuit Split. 2

II. The Fifth Circuit's Decision Is Incorrect. 6

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp., 876 N.E.2d 500 (N.Y. 2007) 5

Doucet v. Dental Health Plans Mgmt. Corp., 412 So. 2d 1383 (La. 1982) 4

Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006) 11

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396 (2010) 6

Hobbs v. IGF Ins. Co., 834 So. 2d 1069 (La. Ct. App. 2002) 4

Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980) 11

Macaluso v. Watson, 171 So. 2d 755 (La. Ct. App. 1965) 4, 5

McDermott Int'l, Inc. v. Lloyds Underwriters, 120 F.3d 583 (5th Cir. 1997) 5

Medellin v. Texas, 552 U.S. 491 (2008) 3, 8, 9, 10

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 12

Stephens v. American Int'l Ins. Co.,
66 F.3d 41 (2d Cir. 1995) 1, 2, 3

Stephens v. National Distillers & Chemical Corp., 69 F.3d 1226 (2d Cir. 1995) 4

STATUTES

15 U.S.C. § 1012(b) 1, 12

28 U.S.C. § 1292(b) 3

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 5

La. Rev. Stat. 9:4201 5

Workers' Compensation Group Self-Insurance Funds, 2010 La. Sess. Law Serv. Act 794 (S.B. 607) 6

OTHER AUTHORITIES

114 Cong. Rec. S10488 (1968) 8

Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 11

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1968) 7, 12

Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 Conn. Ins. L.J. 253 (2004-2005) 11

Restatement (Third) of Foreign Relations Law of the United States (1987) 10

S. Exec. Rep. No. 90-10 (Sept. 27, 1968) 8

SUPPLEMENTAL BRIEF RESPONDING TO THE UNITED STATES AS *AMICUS CURIAE*

The United States acknowledges that the Fifth Circuit's decision in this case conflicts with a Second Circuit decision, and it does not dispute that the issue is important enough to warrant this Court's review. The United States devotes almost all of its brief to arguing the merits of the case, but the petition should not be denied based on its view of the merits. Regardless of whether the Court ultimately decides that the Fifth Circuit or the Second Circuit is correct, it should grant the petition and resolve the conflict.[1]

Moreover, the United States is wrong on the merits. It contends that Chapter 2 of the Federal Arbitration Act ("FAA") preempts state insurance law, notwithstanding the plain language of the McCarran-Ferguson Act, which provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). As the Second Circuit correctly held, Chapter 2 of the FAA is an "Act of Congress" that does not specifically relate to insurance, and therefore it does not preempt state insurance laws. *See Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

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[1] Pursuant to Rule 29.6, Petitioner states that the corporate disclosure statement in its Petition (Pet. ii) remains current.

I. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.

The United States acknowledges that the Fifth Circuit's decision conflicts with the Second Circuit's decision in *Stephens*. U.S. Br. 17. It does not dispute the importance of the question presented. Sixteen states have enacted laws that prohibit arbitration clauses in some or all insurance contracts. *See* Pet. 21 n.6, 22 n.7. The Fifth Circuit's decision calls into question the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company.

The United States nevertheless contends that this Court's review is not warranted because: (1) the conflict "is not sufficiently developed" (U.S. Br. 17-18); (2) the applicable Louisiana law is "unclear" (*id.* at 18-20); and (3) the issue's importance is diminished in light of the recently enacted Dodd-Frank legislation (*id.* at 20-21). None of these arguments is persuasive.

1. The United States contends that this Court's review is unwarranted because of the "limited" nature of the circuit split. U.S. Br. 17. But the fact that the circuit split involves only two circuits does not demonstrate that the disagreement "is not sufficiently developed." *Id.* The Fifth Circuit's decision expressly acknowledges that it creates a circuit split (App. 34a), and the arguments for and against its position are analyzed in majority, concurring, and dissenting opinions of an *en banc* court of appeals.

In suggesting that the Court should wait until the circuit split becomes deeper, the United States ignores the reasons for deciding the issue now. District courts frequently are required to decide the question presented in this case, and those courts have recognized the "'split of authority.'" Pet. 25 (quoting *PinnOak Res., LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 828 (S.D. W. Va. 2005)). Although the issue arises frequently, it typically does so when the foreign insurer moves to compel arbitration or when it removes a state court action to federal court. *See* Pet. 26-28. In either case, the district court's decision typically is not subject to appellate review, regardless of how the court rules. *Id.* As a result, the issue rarely reaches the appellate courts. Indeed, the issue reached the court of appeals in this case and in *Stephens* only because the district courts took the unusual step of certifying the issue for interlocutory appeal under 28 U.S.C. § 1292(b). The United States does not dispute the frequency with which the issue faces district courts or the difficulty in obtaining appellate review. Instead, it simply ignores these points.

Nor should the Court wait to resolve the conflict based on speculation that the Second Circuit "might" reconsider its decision in *Stephens* "in light of the government's view, as expressed in this brief." U.S. Br. 17. For the purpose of interpreting a treaty, the relevant views of the government are the positions taken by the President and Senate in signing and ratifying the agreement (*see Medellin v. Texas*, 552 U.S. 491, 510-11 (2008))—not litigating positions taken decades later by the Department of Justice. As discussed below, the President and Senate clearly

viewed the Convention as non-self-executing. *See* pp. 7-9 *infra*.[2]

2. Contrary to the United States' assertion (U.S. Br. 18-19), there is no dispute that Louisiana law prohibits arbitration clauses in insurance contracts. The Fifth Circuit noted that "[t]he parties agree that requiring arbitration of the present dispute in compliance with the Convention would contravene the Louisiana statute" (Pet. App. 8a-9a), and Respondent has acknowledged in this Court (Opp. 29) that the Louisiana statute covers the insurance policies at issue here.

Nor is there any basis for the United States' speculation that the Louisiana Supreme Court might interpret the state statute differently. For 45 years, it has been clear that arbitration clauses in insurance contracts are unenforceable under Louisiana law. *See Macaluso v. Watson*, 171 So. 2d 755, 757-58 (La. Ct. App. 1965); *see also Hobbs v. IGF Ins. Co.*, 834 So. 2d 1069, 1071 (La. Ct. App. 2002). Both the Louisiana Supreme Court and the Fifth Circuit have recognized this principle. *See Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982) ("Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable."); *McDermott Int'l, Inc. v. Lloyds*

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[2] Contrary to the United States' contention (U.S. Br. 18), there is no "intra-circuit tension" in the Second Circuit because the holding in *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1995) is based on the fact that the Foreign Sovereign Immunities Act, unlike Chapter 2 of the FAA, expressly displaces all contrary state laws. *See* Pet. Reply Br. 3.

Underwriters, 120 F.3d 583, 585-86 (5th Cir. 1997) (Louisiana law "renders arbitration clauses in insurance policies null and void."). Indeed, no reported case has ever questioned whether arbitration clauses in insurance contracts are unenforceable under Louisiana law.[3]

3. The United States is also incorrect to argue that the issue presented in this case is less likely to arise in the future because of the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. U.S. Br. 20-21. This argument ignores the limited scope of the Dodd-Frank preemption provision, which applies only to certain "reinsurance contracts." 24 Stat. at 1595. The provision does not apply to any primary insurance contracts, or to reinsurance contracts subject to the law of the state where the "ceding insurer" is domiciled. *Id.*[4] Because the Dodd-Frank Act preempts state law only for a limited subset of insurance contracts, it will not resolve the growing number of disputes arising out of insurance contracts containing arbitration clauses. As Petitioner explained, "'arbitration provisions are appearing with increasing frequency in all types of insurance policies.'" Pet. 24 (quoting Susan Randall,

[3] Louisiana's general policy favoring arbitration, cited by the United States, predates *Macaluso*. *See* La. Rev. Stat. 9:4201 (enacted in 1948).

[4] Many insurance policies do not contain a choice-of-law provision, and general choice-of-law principles frequently lead to application of the law of the policyholder's domicile. *See, e.g.*, *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 876 N.E.2d 500 (N.Y. 2007).

Mandatory Arbitration ... Insurance Disputes: Inverse Preemption of the Federal Arbitration Act, 11 Conn. Ins. L.J. 253, 253-54 (2004-2005)).

The United States is also wrong to suggest that it is "unclear" whether the Dodd-Frank Act affects the resolution of this case. U.S. Br. 20-21. It clearly does not. The Dodd-Frank provision does not apply because Petitioner's agreement with Respondent is not a reinsurance contract. Louisiana law makes clear that a self-insurance fund (like Petitioner) is not an "insurer." *See* Workers' Compensation Group Self-Insurance Funds, 2010 La. Sess. Law Serv. Act 794 (S.B. 607) § 2. Louisiana follows the majority view, which is that self-insurance is not insurance. *See* Pet. Reply Br. 11 n. 5 (collecting cases).[5]

II. THE FIFTH CIRCUIT'S DECISION IS INCORRECT.

The United States devotes all but a few pages of its brief to arguing that the Fifth Circuit reached the correct result in this case. This argument provides no basis for denying the petition. The Court should grant the petition and resolve the circuit split regardless of whether it ultimately sides with the Fifth Circuit or the Second Circuit. In any event, the Fifth Circuit's decision is incorrect.

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[5] Because the Dodd-Frank Act "makes no mention of retroactivity," it also does not apply to cases pending at the time of its enactment. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406 n.1 (2010).

Conspicuously absent from the United States' discussion of the merits is a defense of the Fifth Circuit's rationale. The court of appeals thought that it was obliged "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. Based on the federal policy favoring arbitration, the court decided that Congress must have intended to exclude acts of Congress that implement treaties from the term "Acts of Congress" in the McCarran-Ferguson Act. App. 16a-17a, 31a-34a. This approach disregards the plain language of the McCarran-Ferguson Act and established principles of statutory construction. *See* Pet. 17-21.

1. The United States argues (U.S. Br. 8-11) that Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("Convention") is self-executing—a view that was unanimously rejected by the Second Circuit and adopted by only one of 18 Fifth Circuit judges. The United States takes this position notwithstanding *Medellin*'s identification of the Convention as an example of a non-self-executing treaty, and statements by the President and Senate that implementing legislation was necessary before the Convention could take effect. According to the United States, these authorities address only Article III of the Convention, and have no application to Article II (which includes the provision that conflicts with Louisiana law). This attempted distinction fails.

Nothing in *Medellin*'s discussion of the Convention suggests that the Court thought implementing legislation was only partially necessary. To the contrary, the Court cited the entirety of Chapter 2 of the FAA, which implemented all Articles of the Convention. *See* 552 U.S. at 521 (citing 9 U.S.C. §§ 201-08). The Court did not limit its citation to Sections 203-205, which the United States identifies as the provisions necessary for implementing Article III of the Convention. U.S. Br. 10-11.

The ratification history also provides no support for the view that implementing legislation was only partially necessary. When President Johnson submitted the Convention to the Senate for ratification, he made clear that that the United States would not deliver an instrument of accession until implementing legislation was enacted. *See* 114 *Cong. Rec.* S10488 (1968) (message of President Johnson) ("Changes in title 9 (arbitration) of the United States Code will be required before the United States becomes a party to the convention. The United States instrument of accession to the convention will be executed *only after the necessary legislation is enacted.*") (emphasis added). Similarly, the Senate, in giving its advice and consent, reiterated that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be required *before the United States becomes a party to the convention.*" S. Exec. Rep. No. 90-10, at 2 (Sept. 27, 1968) (emphasis added). Neither the President nor the Senate suggested that the implementing legislation was necessary only for some provisions and not others. The fact that Congress enacted

legislation to implement the entire Convention confirms that it did not think that implementing legislation was only partially necessary.

The United States bases its contrary view on a statement made by a State Department legal adviser during a congressional hearing. U.S. Br. 10. According to the United States, the President's statement should be read in the "context" of the legal adviser's testimony. *Id.* But surely a subordinate official's statement should be read in the "context" of the President's statement—not the other way around. In any event, the legal adviser did not say that Article II (or any other part of the Convention) is self-executing.[6]

The United States also contends that the text of Article II supports its view, but the text does not distinguish Article II from Article III. The United States notes that Article II contains mandatory language. U.S. Br. 9. But Article III, which the United States recognizes is non-self-executing, contains the same mandatory language as Article II. *See* 21 U.S.T. at 2519 (Articles II & III begin: "Each Contracting State shall recognize . . . ."). The use of terms like "shall" weighs in favor of interpreting a treaty to be self-executing, but nothing in *Medellin* suggests that the use of mandatory language is dispositive on that issue. By arguing that Article III

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[6] The legal adviser stated that legislative changes were necessary to address jurisdictional and venue issues. U.S. Br. 10. The United States appears to interpret this statement as establishing that implementing legislation was necessary *only* to address these issues, but the legal adviser did not say that.

is non-self-executing, the United States recognizes that the use of mandatory language is not dispositive.

In short, the views of the President and Senate that signed and ratified that treaty should be given "great weight." *Medellin*, 552 U.S. at 513 (citation and internal quotation marks omitted). Because the treatymakers clearly thought that implementing legislation was necessary, and Congress enacted such legislation, the United States is wrong to take a contrary view five decades later.

2. The United States also asserts that, even if the Convention is non-self-executing, the McCarran-Ferguson Act does not apply. U.S. Br. 11-17. This position is also incorrect.

a. The United States contends that, even if the Convention is non-self-executing, it is "directly enforceable." U.S. Br. 12-13 & n.2. It bases this view on the fact that Chapter 2 of the FAA incorporates the Convention by reference. *Id.* According to the United States, it would be a "quite different" case had Congress reprinted the Convention's provisions in the U.S. Code, rather than simply referencing them. *Id.* at 12 n.2. Because Congress incorporated the Convention by reference, the United States contends, it can be construed without reference to the implementing legislation.

This argument fails because it is immaterial whether the implementing legislation repeats the contents of the treaty or incorporates those contents by reference. In either case, a court must construe the implementing legislation. *See* 1 Restatement

(Third) of Foreign Relations Law of the United States § 111, cmt. h (1987) ("[I]t is the implementing legislation, rather than the [non-self-executing] agreement itself, that is given effect as law in the United States. *That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation.*") (emphasis added); *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) ("The issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute"); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (quoting 1 Restatement (Third) of Foreign Relations Law § 111, cmt. h).

The United States bases its contrary position on the view of a law professor. U.S. Br. 12 (citing Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n.* (2d ed. 1996)). Even if the professor's view could be treated as law, it is unclear whether he holds the view that the United States attributes to him. Professor Henkin also stated, consistent with the Restatement, that "if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land.'" Henkin, *Foreign Affairs and the United States Constitution* at 200 n.*.

b. According to the United States, the Convention is intended "to establish an exclusive scheme for the enforceability of arbitration provisions" (U.S. Br. 11-12), and federal law must be interpreted to give full effect to that purpose. But the Convention did not establish an "exclusive scheme," and courts cannot ignore the plain

language of the McCarran-Ferguson Act in order to give effect to the purpose of the Convention.

Rather than insisting on an "exclusive scheme," Article XI of the Convention expressly contemplates that the Convention's provisions need not trump state or local law in countries with federal systems (like the United States). 21 U.S.T. at 2521; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) (The Convention "contemplates exceptions to arbitrability grounded in domestic law."). As this Court explained, "Congress may specify categories of claims that it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the convention." *Id.*

Regardless of whether the Convention intended to establish an "exclusive scheme," the relevant question is whether Congress has enacted such a scheme. In arguing that Congress has done so, the United States focuses solely on the Convention and ignores the plain language of the McCarran-Ferguson Act. That statute provides that "[n]o act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). This Court should reject the United States' attempt to elevate the purpose of one federal law over the plain meaning of another. Because Chapter 2 of the FAA is an "Act of Congress" that does not relate to insurance, it does not preempt state insurance laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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